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RULE OF DECISION IN APPELLATE COURT UNDER SEC. 6363.

WHEN IS A JUDGMENT SUSTAINING A VERDICT OR SETTING IT ASIDE AS CONTRARY TO THE EVIDENCE "PLAINLY WRONG OR WITHOUT EVIDENCE TO SUPPORT IT?"

Section 6363 of the Code of 1919 provides that:

"When a case at law, Civil or Criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence and the evidence (not the facts) is certified, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

The revisors of the Code in their note to this section state:

"As this section stood before the revision [1] the latter part of it provided that 'the rule of decision in the appellate court in considering the evidence in the case shall be as on a demurrer to the evidence by the appellant, except that when there have been two trials in the lower court, in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon.' Under the present section 'the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.' The effect of this change is to abolish the rule of decision as on a demurrer to the evidence in such a case, and to substitute therefor a much simpler rule."

1. Code 1887, sec. 3484, as amended by Acts 1889-90, p. 36, and Acts 1891-2, p. 962.

While it may be conceded that once having determined the precise effect [2] of the new rule the revisors are probably correct in stating that it is simpler than the old, yet the ascertainment of this effect seems not such a very simple matter in view of the language that has been used by the court and by text writers in construing Sec. 3484 of the old Code. Indeed with these expressions in view it might be plausibly argued that the revised section has *effected no change at all* in the rule of decision in these cases.

The rule of decision as upon a demurrer to the evidence, indeed, seemed clear enough, viz., that the demurrant (here the appellant) admitted the truth of all his adversary's evidence together with all inferences that might be fairly drawn therefrom, and waived the benefit of all of his own evidence that had been in any manner contradicted or impeached, and all inferences that did not necessarily flow from his unimpeached and uncontradicted evidence; and further that if on this view of the evidence, a jury might have found for the demurree (here the appellee), the court must do so. However, Judge Burks in his authoritative work on Pleading and Practice thus explains the effect of the old rule:[3]

"If, however, the certificate be one of evidence, then the

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2. In considering the effect of Sec. 6363 we are met at the threshhold by a difficulty or inaccuracy in its wording. The phrase "a party excepts to the judgment or action in granting or refusing to grant a *new trial* on a motion to set aside the verdict," etc., is open to the objection that under Sec. 6251 the trial court ordinarily does not grant new trials where it believes the verdict to be contrary to the evidence but sets it aside and enters final judgment on the merits. It is believed that the reference to a new trial should probably have been omitted so that the phrase just quoted would read "a party excepts to the judgment or action of the court * * * on a motion to set aside the verdict," etc. As the phrase stands, if strictly construed, it would seem to limit the operation of Sec. 6363 to the comparatively few cases in which the court would be unable to enter final judgment under Sec. 6251. This of course would be contrary to the obvious intent of the revisors, and accordingly it has not been so construed and the point seems not to have been raised. See P. Lorillard Co. *v.* Clay (Va.), 104 S. E. 385.

3. BURKS, PL. & PR. (1st. Ed.), Sec. 384.

plaintiff in error goes up as on a demurrer to the evidence, and the verdict and the judgment thereon of the trial court will not be disturbed unless it is *plainly contrary to the evidence,* or is *without evidence to support it.* If the evidence is conflicting on material points the judgment of the trial court sustaining the verdict of the jury will be affirmed." (*Italics supplied.*)

This language is almost identical with that used in the new section, and similar expressions may be found in many of the cases bearing on this point. Thus in Reusens *v.* Lawson,[4] it is said:

"This court will not, under these circumstances, set aside the verdict of a jury, except where the jury has *plainly decided against the evidence or without evidence,* although the judges of this court, upon the evidence as it is presented to them in the record, if they had been on the jury, might have rendered a different verdict. We cannot, under repeated decision of this court, set aside the verdict of a jury merely in a doubtful case. We can only do so where the verdict is a plain deviation upon the evidence from right and justice, or where there is a palpable insufficiency of evidence to sustain it." (*Italics Supplied.*)

And again in *Richmond College* v. *Scott-Nuckolls Co.*:[5]

"In order to justify a reversal on that ground, the verdict must be *plainly against the evidence, or without evidence to support it.*" (*Italics Supplied.*)

It might be argued that, since such language had been used in these and other cases,[6] where there could be no question as to the application of the rule of decision as upon a demurrer to the evidence, therefore, the adoption of similar language in the Code of 1919 adopted with it the construction with which it had been heretofore used, i. e., as *identical with the old rule.* And in further support of this theory it might be urged that where the judgment is "without evidence to support it" it would clearly be set aside under the demurrer to the evidence rule as well as under the new section; and that where it is "plainly wrong" or "plainly contrary to the evidence" the same result would also

4. 96 Va. 285, 293.

5. 124 Va. 333.

6. See Pettyjohn *v.* Basham, 126 Va. 72, and many others.

ensue under both rules, since, it might be argued, the appellate court cannot say that it is "plainly wrong" where there is evidence, however slight, to support the appellee's theory *at every material point,* the jury being privileged to accept as true any evidence that he may produce no matter how overwhelming the countervailing evidence may be; and in cases where evidence was *lacking* to sustain the appellee's theory *on any material point* the verdict would equally be set aside under the old demurrer to the evidence rule, and under the new rule as being "without evidence to support it."

However, it is believed that this argument is fallacious. The revisors undoubtedly intended to change the rule and it is believed that they have done so; and further that the change is both material and beneficial. And this seems settled by the language of the Supreme Court of Appeals in several recent cases, in which, however, the court has not undertaken to define very precisely the extent and effect of the change. Thus Judge Burks, in *P. Lorillard Co.* v. *Clay*:[7]

> "Formerly a plaintiff in error stood in this court in the position of a demurrant to the evidence, but *this has been changed.* Now, in stating a case in this court which has been tried by a jury, it must be stated as the jury may have viewed it, remembering always that the jury are the sole judges of the weight to be given to the testimony of the witnesses, and also bearing in mind the weight attached to the verdict of a jury which has received the approval of the trial judge." [8] (*Italics Supplied.*)

To determine the true effect of this change [9] it is well to ask,

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7. *Supra.*

8. So too in Graham *v.* Com., 127 Va. 808.

"We have, under Code 1919, Sec. 6363, carefully considered all of the evidence in the case, and upon giving the weight to the decision of the jury upon the matters of fact dependent upon the evidence which is conflicting and which involves the credibility of witnesses," etc. See also U. S. Fidelity, etc., Co. *v.* Country Club (Va.), 105 S. E. 686, and other recent cases cited, *infra.*

9. In determining the effect of this change we are confined to a discussion based upon the theoretical principles with such light as can be thrown upon them by earlier rulings in this state. None of the Codes of other states to which the writer has access contain

without reference to prior rules: When is such a judgment "plainly wrong or without evidence to support it?" To answer this we must go back to the trial court and consider the circumstances under which that court should set aside a verdict as contrary to the evidence. It is believed that the language above adverted to as seeming to identify the old rule with the new applies more accurately to the rule which should guide the trial court in these cases, than to the former rule of decision in the appellate court, with reference to which it was uttered. In other words the rule is believed to be that the trial court should not set aside a verdict unless it is "plainly contrary to the evidence or without evidence to support it." Furthermore, in interpreting the phrase "plainly contrary to the evidence" the rule appears to be that the trial court *may set aside* a verdict which has some *slight evidence to support it* where this evidence is *badly impeached* or *contradicted by strong and overwhelming evidence* on the other side. To state an extreme case, if the jury has rendered a verdict for a party who has produced only one witness, and he of slight reputation for veracity, and this witness has been directly contradicted by twenty or more reputable witnesses for the losing party, that verdict should be set aside.[10] Yet such a verdict would be *sustained* if viewed as upon a *demurrer to the evidence.* Thus as said in *Wadkins* v. *Damascus Lumber Co.*,[11] "The position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor." It follows then that the trial court had greater freedom in setting

similar provisions the judicial construction of which might be considered as adopted with the adoption of this section. Nor does a limited examination of some of the cases from other jurisdictions reveal any similar statute, though the rules arrived at in other states without the aid of statutes appear to be much the same as those believed to be adopted in Virginia by the new Code. 4 C. J. 833, 856, *et seq.*

10. Cardwell *v.* Norfolk, etc., R. Co., 114 Va. 500, 77 S. E. 612 Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657; Chesapeake, etc., R. Co. *v.* Anderson, 93 Va. 650, 25 S. E. 947; Marshall's Adm'r *v.* Valley R. Co., 97 Va. 653, 34 S. E. 445; Chapman *v.* Va. Real Estate Co., 96 Va. 177, 31 S. E. 74.

11. 121 Va. 691, 93 S. E. 591.

verdicts aside than the appellate court had under the old practice upon appeal after the trial court had declined to do so. And therefore it might have happened under this procedure that *a trial court might err in not setting a verdict aside* where the countervailing evidence was overwhelming *and yet the appellate court* reviewing the evidence as upon a demurrer thereto *would have been powerless to reverse the erroneous judgment of the lower court.*

Under the new rule it is believed, however, that the appellate court, stands, so to speak, in the shoes of the trial court. It will examine *all* of the evidence,[12] and if, in its opinion, the trial court should have set aside the verdict (or erred in doing so as the case may be), it will reverse the lower court[13] and enter final judgment itself, under Sec. 6365. However, in case of

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12. When *all* of the evidence is not certified, the appellate court will presume that there was some testimony not set out which justified the verdict, especially where it is approved by the trial judge. Adams *v.* Hays, 86 Va. 153, 9 S. E. 1019; McArter *v.* Grigsby, 84 Va. 159, 4 S. E. 369.

But the rule was formerly otherwise. Indeed it has been repeatedly held that when a bill of exceptions is so indefinite as not to show whether an instruction or evidence was proper of not, the judgment should be reversed. Brooke *v.* Young, 3 Rand. 106; McDowell *v.* Crawford, 11 Gratt. 398. This gave the remarkable result that a plaintiff in error might have any judgment reversed by merely making his bill of exceptions defective, as by failing to state all the evidence. Old Father Antic, the Law! This rule of course could not last. But after all it is understandable when we remember that in theory the bill of exceptions was made out by the judge. Reversal was the penalty for making out a defective bill.

13. It is believed that this sets forth the correct interpretation of the section. However, if this be true, a constitutional question at once arises. Under Secs. 6251 and 6365 when verdicts are set aside in either the lower court or the appellate court final judgment is now usually rendered upon them without any new trial. Does this deprive the party whose verdict has been set aside of his constitutional right of trial by jury? Formerly the question did not arise for when his verdict was set aside he was given his opportunity at a second trial. Under the new section it would seem to arise only when a verdict, supported by slight evidence on all material points has been set aside as contrary to the overwhelming weight of the evidence; for if the party who had gained the verdict had failed to bring for

doubt the action of the lower court will be sustained, for to justify reversal such action must be "plainly" wrong.[14]

It might seem at first glance that this rule would operate harshly upon an appellant who had won the verdict of the jury in the court below only to have it set aside by the trial court. For the requirement that the judgment of the trial court be not reversed unless plainly wrong might appear not to allow sufficient weight to the verdict of a jury where it had been so set aside. This objection however is really groundless for when the lower court has disagreed with the jury it will be much easier for the appellate court to say that its judgment is plainly wrong than it will in those cases in which the court has sustained the verdict of the jury.

The change upon the whole will be seen to be favorable to the appellant, although it is improbable that very many more judgments will be reversed under the new provisions than under the old. For while it is true that under the old rule no matter how strong a case the appellant may have made on the trial he could not succeed in his appeal when the appellee had maintained his case by any evidence, however slight, as to all its material points, still, today, he should not prevail on the lower court to set the verdict aside unless he have an overwhelming preponderance of the evidence or his opponent's be lacking on some vital point; and failing to have the verdict set aside in the lower court he must have still a stronger case to secure relief

would no more deprive him of his right to a jury trial than would a decision against him on a demurrer to a defective pleading. The constitutional questions thus raised are however beyond the scope of this article.

14. Formerly it was settled that: "As a general rule a stronger case must be made in order to justify an appellate court in disturbing an order granting a new trial than where a new trial has been refused; the reason usually assigned for this rule being that the refusal to grant a new trial operates a final adjudication of the rights of the parties, while the granting of a new trial simply invites further investigation." Vaughn *v.* Mayo Milling Co., 127 Va. 148. However, since the trial judge in setting aside a verdict as a rule no longer grants a new trial, but enters such judgment as he deems correct under Sec. 6251, this principle would seem to be no longer applicable in the usual case.

in the appellate court since it will resolve every doubt in favor of the decision of the lower court.[15]

These conclusions will be strengthened it is believed by a brief consideration of the rule of decision in these cases prior to the enactment of the Code of 1887, and an inquiry into the effect of the rule adopted by that Code, as amended a few years later, upon the classes of cases to which it was applicable.

The history of the rule was ably sketched by Judge E. C. Burks in an article in 9 Va. Law Journal, p. 257 and again by the court in Muse *v.* Stern,[16] just prior to the passage of the Code of 1887.[17] Judge Burks thus lays down the law as it stood at that time, his conclusion being based upon cases in which the trial court had refused to disturb the verdict: "On such review, the court will not reverse the judgment unless, after *rejecting all* the *oral* evidence of the *excepting* party and *giving full force and credit to the evidence of the adverse party,* the judgment still appears to be wrong."

The same rule was applicable to criminal cases at this time.[18]

It will be observed that this rule was even more stringent than the demurrer to the evidence rule, since, under the latter, the appellant waived, not *all* of his evidence, as under this rule, but merely that which had been impeached or contradicted.

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15. As said in Cardwell *v.* Norfolk, etc., R. Co., 114 Va. 500, "No attempt has been made, so far as we are advised, by the courts or the law writers to formulate a rule defining the limit to which the trial court or the appellate court may go in reviewing the evidence to ascertain and to determine whether or not a verdict of a jury is plainly against the evidence or without evidence to support it. Indeed, it would be a task difficult, if not impossible of performance, to prescribe with circumstantial precision the extent to which the trial court or the appellate court may properly examine the evidence with the view of determining whether or not the verdict of the jury thereon should be disturbed."

16. 82 Va. 33, 3 Am. St. Rep. 77.

17. In England no appeal was allowed in such cases. In Virginia it was allowed at first only where the judge certified the *facts.* Later it was settled that if he was unable to certify the facts he might, if he *chose,* certify the *evidence.* Finally the rule was established that if he could not certify the facts he might be *compelled* to certify the evidence. See article by Judge Burks, cited *supra.*

18. Finchim's Case, 83 Va. 689.

For cases in which the court had disagreed with the jury and set aside the verdict, none of which appear to have been decided in the appellate court under a certificate of the evidence at the time of Judge Burks' article, the court shortly afterwards in *Muse* v. *Stern, supra,* laid down the following rule as stated in the reporter's syllabus:

> "Where evidence is conflicting and involves credibility, and the verdict is set aside and the *evidence* is certified, this court will look at the *whole evidence,* and sustain the verdict, unless it be against the law or the evidence, or without evidence."

This rule seems to be substantially that which has been adopted by the new Code for all cases.

Still a different rule prevailed where the case was submitted to the court without a jury, an appeal being taken on the ground that the decision was contrary to the evidence. Here, despite some difference of opinion, it seems that the appellant was regarded as in the position of a demurrant to the evidence [19]— the rule later adopted by the Code of 1887 for this and other cases.

The effect of the enactment of that Code upon the several rules above stated, and consequently the change made by the Code of 1919 will be found to vary more or less as applies to (1) Civil or Criminal cases, (2) cases tried by a jury or those submitted to the judge, and (3) cases in which the trial court refused to set aside the verdict or those in which it granted the motion.[20]

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19. Hodge's Ex'or *v.* First Nat'l Bank, 22 Gratt. 51, 56; 9 VA. L. J. 263.

20. To a certain extent the rule was affected by the question of whether the burden of proof in the lower court had been upon the appellant or upon the appellee. Consider the case in which a verdict *against* the party upon whom rested the burden of proof was found by the jury and sustained by the court. In such case, upon appeal under the Code of 1887, the appellant was regarded as in the position of a demurrant to the evidence, despite the fact that in this case he had *himself* been carrying the burden of proof. In any state except Virginia and West Virginia this would be nonsense —or another way of stating that there was no appeal in such cases. For in all these other jurisdictions the demurrant waives *all* of his

I. CIVIL CASES.

Trial by Jury.—A civil case in which there has been a trial by jury and verdict approved by the trial judge seems to be the most usual type that arises under the statute. And it is to this class that the preceding discussion has been mainly addressed, some of it being clearly inapplicable to other classes. Here the rule of decision as upon a demurrer to the evidence was simple of application (at least where the verdict was in favor of the party carrying the burden of proof), and strictly speaking, under the statute only, the *evidence* should have been considered. Practically however the approval of the trial judge was given great weight in doubtful cases, the decisions abounding in expressions to that effect. The new Code appears plainly to allow such weight to be given the trial judge's opinion, and yet reversal is easier than formerly, for, as above stated, the appellate court will set aside the verdict wherever the trial court should have done so, which seems not to have been true in all cases heretofore.[21]

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own evidence, and hence the party carrying the burden of proof cannot demur to the evidence—for there could be nothing left unwaived to which he might demur. In Virginia and West Virginia, however, it is well settled that the demurrant waives only such of his evidence as has been impeached or is in conflict with the demurree's, and accordingly it has been held in Virginia that the party on whom rests the burden of proof may demur to the evidence. Bonos *v.* Ferries Co., 113 Va. 495, 75 S. E. 126; Wood *v.* Phillips, 117 Va. 878, 86 S. E 101 The result is a sort of inverted demurrer, the question being whether the *demurrant's own evidence* is sufficient to support the verdict after waiving all of it that is impeached or is in conflict with the demurree's evidence. It will be seen that this places a very onerous burden upon the demurrant, yet, as applied to appeals, while the evidence to be examined was somewhat different where the party carrying the burden of proof was the appellant, the effect was after all very much the same. See Abernathy *v.* Emporia Mfg. Co., 122 Va. 406.

21. Recent cases of this type are: Norfolk, etc., R. Co. *v.* Fentress, 127 Va. 87; Norfolk, etc., R. Co. *v.* Simmons, 127 Va. 419; Washington, etc., R. Co. *v.* Warren, 124 Va. 452; Atlantic, etc., R. Co. *v.* Tyler, 124 Va. 484; Virginia Talc., etc., Co. *v.* Hurkamp, 124 Va. 721; Richmond College *v.* Scott-Nuckolls Co., *supra;* E. I. Du Pont Co. *v.* Taylor, 124 Va. 750; Norfolk Hosiery, etc., Co *v.* Aetna, etc., Co., 124 Va. 221; Craddock Lumber Co. *v* Jenkins

But where in a civil case, tried by a jury, the verdict of the jury was *set aside* by the trial court and a *new trial granted,* under the old procedure, there seemed to be considerable doubt as to the correct rule of decision if the case finally reached the appellate court after the second trial. The code, as amended, distinctly stated that in such case the appellate court should "look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." The question remained, however, whether, in looking at the evidence on the first trial, the court should do so as on a demurrer by the appellant thereto.

The question was considered at some length by Judge Cardwell in *Cardwell* v. *Norfolk, etc., R. Co.,*[22] the conclusion being reached that the evidence was not to be considered as upon a demurrer thereto. The other judges, however, though concurring in the result in that particular case, stated that in their opinion it was unnecessary, in view of the facts of that case, to decide what the rule of decision under Sec. 3484 of the Code of 1887 was, and whether there was any conflict in the previous cases on that subject; and they further said that they did not concur in all that was said in Judge Cardwell's opinion as to the rule of decision under that section. And in *Marshall's Admr.* v. *Valley Ry. Co.,*[23] it is distinctly stated that the case was heard as upon a demurrer to the evidence.

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124 Va. 167; Manor & Others *v.* Hindman, 123 Va. 767; Lynchburg Traction, etc., Co., *v.* Gordon, 123 Va. 198; Aetna Ins. Co. *v.* Aston, 123 Va. 327; Virginia Ry., etc., Co. *v.* Boltz, 122 Va. 649; Virginia Portland Cement Co. *v.* Swishen, 122 Va. 123; Hunter *v.* Burroughs, 123 Va. 113; Clinchfield Coal Corp. *v.* Redd, 123 Va. 420; Wilkins *v.* Henderson, 123 Va. 275; Reynolds *v.* Wallace, 125 Va. 315; Ely *v.* Gray, 125 Va. 708; Eichelbaum *v.* Klaff, 125 Va. 98; Bowen's Ex'r *v.* Bowen, 122 Va. 1; Abernathy *v.* Emporia Mfg. Co., *supra;* Town of Farmville *v.* Wells (Va.), 103 S. E. 596; Kritselis *v.* Petty (Va.), 105 S. E. 536; U. S. Fidelity, etc., Co. *v.* Country Club, *supra;* E. I. Du Pont & Co. *v.* Brown (Va.), 105 S. E. 660; Tucker Sanatorium *v.* Cohen (Va.), 106 S. E. 355.

22. *Supra.*

23. *Supra.*

However, in numerous other decisions both before and since these cases, it has been flatly stated that where there have been two trials the appellate court in reviewing the evidence on the first trial does not regard it as upon a demurrer thereto,[24] and the same position is taken by Judge Burks in his work on Pleading and Practice.[25] It is believed that these cases established the rule that where there had been two trials the appellate court in looking to the proceedings on the first trial would consider *all* of the evidence of *both parties,* just as the trial court should have done in determining whether the verdict should have been set aside, and then, giving due weight to the opinion of the trial judge, will sustain the verdict unless it was *contrary to the evidence,* or *without evidence to support it.* This being so, it will be seen at once that the rule under the new Code is precisely the same as it was under the old section where there had been two trials.[26]

Case Submitted to Judge.—When a civil case is submitted to the judge as to matters of both law and fact without the intervention of a jury, the rule of decision in case of appeal on the ground that the judgment was contrary to the evidence was, by the express terms of the Code, under the old procedure, the same as in cases of trial by jury, i. e., as upon a demurrer to the evidence by the appellant. While in terms the rule was the same here in both cases, its effect was more severe upon the losing party where the case had been submitted to the judge. For in case of trial by jury, as shown above, the *lower court* might have set aside the verdict where it was plainly contrary to the *great weight* of the evidence, even though the opposing party

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24. Palmer *v.* Showalter, 126 Va. 306; Shiveley's Adm. *v.* Norfolk, etc., R. Co., 125 Va. 384; Carter *v.* Washington, etc., R. Co., 122 Va. 458; Thompson *v.* Norfolk, etc., Traction Co., 109 Va. 733; Citizens Bank *v.* Taylor, 104 Va. 164.

25. BURKS, PL. & PR. (1st. Ed.), Sec. 384.

26. Of course under Sec. 6251 there is now ordinarily only one trial in the lower court. Recent cases of this class are: Commander *v.* Provident Relief Association, 126 Va. 455; Palmer *v.* Showalter, *supra;* Southern Amusement Co. *v.* Ferrell, 125 Va. 429; Shiveley's Adm. *v.* Norfolk, etc., R. Co., *supra;* Carter *v.* Washington, etc., R. Co., *supra.*

had made a case strong enough to stand the test of the demurrer to the evidence rule. But where the jury had been waived there was no tribunal clothed with this authority and the *appellate court* was bound to uphold the lower court if there was *any evidence at all* supporting it on each material point. Thus in effect the decision of a judge in such cases was given greater weight than the verdict of a jury in similar cases, since the verdict of the latter might be set aside where it was "plainly *contrary* to the evidence" as well as where it was "*without* evidence to support it," while the decision of the judge in a case submitted to him could be reversed on appeal *only* when "*without evidence* to support it," i. e., when the evidence was insufficient when viewed as upon a demurrer thereto.

Here the new Code has apparently made a sweeping change. It is believed that the appellate court now stands in precisely the same position with regard to reversing such judgments that the lower courts have always stood with regard to setting aside verdicts of juries. They will be set aside where plainly contrary to the evidence. Furthermore this implies that they will be set aside more freely than verdicts rendered by juries and sustained by the trial courts under the new procedure. Before the trial court can set aside a verdict it must appear that *the jury* was plainly wrong. And before the upper court can reverse the trial court for not setting it aside, it must be shown both that the *jury* was plainly wrong and also that the *trial court* was plainly wrong in failing to so hold. In other words a verdict of a *jury* might conceivably be *plainly wrong,* and yet so near the border line that the action of the *trial court* in refusing to set it aside, while *wrong,* would yet not be *"plainly wrong,"* so as to justify reversal on appeal. To show that a verdict was plainly wrong and that a trial court was plainly wrong in not seeing and declaring it to be so requires a very clear case indeed. Under the new Code, the appellate court now looks at a judgment of the trial court in cases submitted to it in the same light in which the trial court looks at the verdict of a jury, and in so doing it would seem not to require so strong a showing to enable the appellate court to declare *that judgment* to be plainly wrong as it would

to enable it to declare that a *verdict* was plainly wrong *and* the *lower court* plainly wrong in not setting it aside.[27]

II. CRIMINAL CASES.

In criminal cases the change, while apparently precisely the same as in civil cases in which a verdict found by the jury had been approved by the lower court, seems to be even more desirable than in those cases. For in criminal cases it must be remembered that the jury should not convict unless convinced of the guilt of the accused beyond a reasonable doubt. Yet, under the old practice, if the Commonwealth made a *prima facie* case by any sort of evidence no matter how feeble, the accused, upon conviction, could have no relief by appeal from the refusal of the trial court to grant him a new trial, even though the overwhelming weight of the evidence may have been favorable to him. The new rule changes this, and the appellate court will now set aside the verdict whenever the lower court should have done so. And the rule in the lower court is the same in criminal cases as in civil cases, i. e., the verdict will be set aside when plainly contrary to the evidence or without evidence to support it.[28]

It might be thought that, in view of the requirement that the jury be convinced beyond a reasonable doubt before rendering a verdict of guilty, a stronger case would have to be made out by the Commonwealth in order to justify the lower court in refusing to disturb a verdict of guilty than would be required of the successful party in a civil suit. In other words, since greater certainty is required for conviction, when that degree of certainty does not appear to have been attained the *trial court* might set the verdict aside even though in its opinion the evidence might have been sufficient to have sustained a verdict in a civil cause where less certainty is required. This how-

27. Recent cases of this type are: Town of Appalachia *v.* Mainous, 126 Va. 419; Pettyjohn *v.* Basham, *supra;* Hilliard *v.* Union Trust Co., 123 Va. 724; Smith-Gordon Co. *v.* Snellings (Va.), 107 S. E. 651; F. W. Stock & Sons *v.* Owen & Barker (Va.), 105 S. E. 587.

28. Grayson *v.* Com., 6 Gratt. 712; Vaiden *v.* Com., 12 Gratt. 717; Read *v.* Com., 22 Gratt. 924, 944; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

ever does not appear to be the rule. For in *Vaiden* v. *Com.*,[29] the following language, which seems never to have been overruled or disapproved, was used:

> "And in passing upon the case as presented by the evidence, we must be governed by the same rules, and conform to the same principles, which prevail in civil cases. In the latter, it is true the jury are to weigh the evidence and to decide according to its preponderance, while in criminal cases it has been usual for the courts to advise the jury to require clear and satisfactory proof of the guilt of the prisoner before they bring in a verdict of conviction; and if they entertain a reasonable doubt of his guilt, to give him the benefit of the doubt, and bring in a verdict of acquittal. But this is a matter for the guidance of the jury in the performance of their especial and peculiar function of responding to the questions of fact involved, and not for the government of the court before which the trial is had, in reviewing the action of the jury, and still less for that of this court in reviewing the action of that court. This court can only inquire whether the verdict is warranted by the evidence before it; it certainly cannot enter upon an enquiry whether the jury should not have entertained a reasonable doubt of the guilt of the prisoner, and set aside the verdict or suffer it to stand, according to the supposed result of such an enquiry."

From the above statement it will be seen that a prisoner convicted despite a clear *preponderance* of the evidence *in his favor* would still have no relief either from the trial court or upon an appeal, in case there was sufficient evidence to support the verdict according to the principles applicable in civil cases.[30] But under the new Code he will at least be able to secure a new trial

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29. *Supra.*

30. See however Williams *v.* Com. (Va.), 107 S. E. 655, and Henderson *v.* Com. (Va.), 107 S. E. 700, where the appellate court set aside convictions stating that the evidence seemed to be at least "equally consistent" with the theory of innocence, as with that of guilt. These cases may possibly be considered as overruling Vaiden *v.* Com., *supra*, and establishing the rule that the court *will* "enter upon an enquiry whether the jury should not have entertained a reasonable doubt of the guilt of the prisoner" and will set aside the verdict if the evidence appears to be plainly insufficient to extinguish that reasonable doubt.

from the appellate court in all cases in which the overwhelming weight of the evidence is in his favor and the trial court has failed in its duty of setting aside the verdict, while formerly this was true only where the evidence of the Commonwealth was insufficient to sustain a conviction when considered as upon a demurrer thereto.[31]

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31. Recent criminal cases involving this rule of decision are: Graham *v.* Com., 127 Va. 808, Lufty *v.* Com., 126 Va. 707; Lucchesi *v.* Com., 122 Va. 872; Karnes *v.* Com., 125 Va. 758; Webb *v.* Com., 122 Va. 899; Williams *v.* Com., *supra;* Henderson *v.* Com., *supra;* Harris *v.* Com. (Va.), 105 S. E. 541; Ambrose *v.* Com. (Va.), 106 S. E. 348; Stallard *v.* Com. (Va.), 107 S. E. 722.